**No. 01-19-01008-CR**

**IN THE COURT OF APPEALS**
**FOR THE FIRST DISTRICT OF TEXAS**



**THE STATE OF TEXAS**
*Appellant*

**v.**

**LAKESIA BRENT**
*Appellee*

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On Appeal from Cause No. 2012280
From the County Court at Law No. 12 of Harris County, Texas

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# BRIEF FOR APPELLEE

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**Oral Argument Requested**

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## IDENTITY OF PARTIES AND COUNSEL

| | |
|---|---|
| APPELLEE: | Lakesia Brent<br>23222 Postwood Park Lane<br>Spring, Texas 77373 |
| PRESIDING JUDGES: | Hon. Robin Brown, at trial<br>Hon. Genesis Draper, at clemency hearing<br>County Criminal Court at Law No. 12<br>Harris County, Texas<br>1201 Franklin<br>Houston, Texas 77002 |
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## STATEMENT OF THE CASE AND FACTS

On February 17, 2015, Complainant called her doctor's office to report that her cell phone was missing (C.R. at 7). A review of surveillance footage from the office showed Lakesia Brent picking up the phone in the waiting area (C.R. at 7). Ms. Brent was contacted by law enforcement, but did not return the phone (C.R. at 7).

Ms. Brent was charged by information with misdemeanor class B theft on February 27, 2015, and was convicted by a jury on March 4, 2016 (C.R. at 6, 48). The Court sentenced Ms. Brent to 180 days county jail, suspended for one year (C.R. at 48). Ms. Brent was discharged from community supervision on March 22, 2017 (C.R. at 53).

On November 1, 2019, a *Motion to Set Aside the Verdict and Dismiss Pursuant to Texas Code of Criminal Procedure Art. 42A.701(f)* was filed on Ms. Brent's behalf (C.R. at 55). Since her conviction for misdemeanor theft, Ms. Brent has been a business owner, been involved in her church, and raised two children (C.R. at 56-57). Ms. Brent has one prior involvement in the criminal justice system – a successfully completed deferred adjudication which she received for an offense committed at the age of 17 (C.R. at 57). That offense occurred nearly 21 years before the theft currently at issue (C.R. at 57).

At a hearing held November 8, 2019, although the State objected to the trial court's jurisdiction, the State did not dispute that Ms. Brent otherwise qualified for judicial clemency relief (C.R. at 63). The trial court granted Ms. Brent's motion on November 19, 2019, and the State filed notice of appeal on December 3, 2019 (C.R. at 69).

## ISSUES PRESENTED

**REPLY TO APPELLANT'S CLAIM OF ERROR ONE: THE TRIAL COURT HAD JURISDICTION TO GRANT APPELLEE'S JUDICIAL CLEMENCY**

**REPLY TO APPELLANT'S CLAIM OF ERROR TWO: THE ISSUE OF WHETHER APPELLEE'S DISCHARGE WAS ELIGIBLE FOR JUDICIAL CLEMENCY IS WAIVED**

## SUMMARY OF THE ARGUMENT

As the Legislature has not limited a trial court's jurisdiction to grant judicial clemency, the trial court did not err in granting Ms. Brent's motion for judicial clemency. The State did not previously raise its claim of error two in the trial court, so that error, if any, is waived. If this court finds that the issue is not waived, the trial court did not err in granting judicial clemency because the statute does not bar discharge of community supervision due to expiration of the term from consideration for judicial clemency.

## ARGUMENT

Although the State claims a single point of error in its brief (Appellant's Brief p. 4), it presents two claims of error – that the trial court did not have jurisdiction to grant Ms. Brent's motion for clemency (Appellant's Brief p. 6), and that the trial court's order was void because Ms. Brent's discharge was not eligible for judicial clemency (Appellant's Brief p. 10). The two claims will be addressed separately.

### REPLY TO APPELLANT'S CLAIM OF ERROR ONE: THE TRIAL COURT HAD JURISDICTION TO GRANT APPELLEE'S JUDICIAL CLEMENCY

The only question at issue is whether the trial court had jurisdiction to grant judicial clemency when Ms. Brent had been discharged from community supervision over thirty days before the filing of the motion. Despite the State's characterization of the issue as essentially settled, it is not. Neither the Court of Criminal Appeals nor this Court has not ruled directly on this issue; this is a case of first impression.

### A. Analysis of Case Law and Statutes

1. <u>An Unsettled Question</u>

The State cites *State v. Dunbar* and *In re State ex rel Sistrunk* for the proposition that the trial court loses jurisdiction over the accused thirty days

after sentencing (Appellant's Brief p. 4). *State v. Dunbar*, 297 S.W.3d 777 (Tex. Crim. App. 2009); *In re State ex rel Sistrunk*, 142 S.W.3d 497, 503 (Tex. App.—Houston [14th Dist.] 2004, no pet). However, neither of these cases stands for such a proposition.

In *Dunbar*, the Court of Criminal Appeals affirmed the appellate court's ruling that the State could complain for the first time on appeal that the trial court lacked jurisdiction to place the appellee on shock community supervision. *Dunbar*, 297 S.W.3d at 778. The appellate court held the State was not barred from complaining that appellee was statutorily ineligible for shock community supervision, even if the State had not claimed such on the record. *Id.* Speaking more broadly, the Court of Criminal Appeals stated that if no community supervision is imposed, no motions for new trial or in arrest of judgment are filed, and no appeal taken, then the trial court's personal jurisdiction terminates thirty days after sentencing, unless a source of jurisdiction is found to authorize the trial court's orders. *Id.* at 779 (internal citations omitted). The Court then discussed the shock probation statute as an example of one such source of jurisdiction, before confirming that the statute did not apply to appellee. *Id.* The case does not discuss judicial clemency specifically.

In *Sistrunk*, the family of a decedent in a manslaughter case filed an amicus curiae notice of appeal of the defendant's sentence. *Sistrunk*, 142 S.W. 3d 497. The appellate court limited the trial court's power to act in the case to the plenary jurisdiction for the first thirty days after sentencing. *Id.* at 503. The court settled on the thirty-day limit because that is the time in which a trial court can receive a motion for new trial or motion in arrest of judgment. *Id*. The court stated that a trial court has inherent power to correct, modify, vacate, or amend its own rulings so long as the court does not exceed a statutory timetable, but there was no specific discussion of judicial clemency. *Id.*

The case at hand does not concern motions for new trial or motions in arrest of judgment. It does not ponder the limitations of shock community supervision. It only asks, "What time limit, if any, is there on a trial court's power to grant judicial clemency?" Neither *Dunbar* nor *Sistrunk* answer that question.

2. No Binding Authority for Appellant's Position

The State's position is that a trial court's power to grant judicial clemency is limited to thirty days after discharge or termination. For authority, the State cites cases that are not binding authority, are unpublished, or both. *Shook v. State,* 244 S.W.2d 220, 221 (Tex. Crim. App. 1951)(stating that courts are not

bound by the decisions of other courts of equal jurisdiction). What should be garnered from the published opinions is that the appellate courts that have limited trial court jurisdiction to grant judicial immunity have done so solely based on jurisdictional limitations for motions for new trial and motions in arrest of judgment.

For instance, in *State v. Fielder*, the Waco Court notes that jurisdictional limitations are subject to statute, but finding no statute that limits jurisdiction for judicial clemency, subjects that power to the limitations in the rules governing motions for new trial and motions in arrest of judgment. *State v. Fielder*, 376 S.W. 3d 784 (Tex. App.—Waco 2011, no pet.). The *Fielder* court relied heavily on the decision in *State v. Patrick*. 86 S.W.3d 592 (Tex. Crim. App. 2002). However, *Patrick* was a case not about judicial clemency, but about a court ordering DNA testing outside of a Chapter 64 or habeas proceeding. *Patrick*, 86 S.W.3d at 595.

In *State v. Shelton*, the Amarillo Court of Appeals admitted that, "as for a time limit on the authority of a trial court to grant judicial clemency if it has already granted a regular discharge, the statute is silent." 396 S.W. 3d 614, 616 (Tex. App—Amarillo 2012, pet. ref'd). In fact, at no time in its history from 1985 to the present has the judicial clemency statute contained language stating

when the court may grant this "less common type of discharge" after having granted a regular discharge. *Id*. The appellate court noted that "if the legislature intended that trial courts have continuing jurisdiction over cases in which community supervision has been completed…for the purpose of considering further requests for judicial clemency…the Legislature knows how to provide it." *Id.* at 617-618. Nevertheless, the court felt comfortable deciding to limit a trial court's power to grant judicial clemency on the Legislature's behalf. For authority, the *Shelton* court cited *Patrick*, which does not discuss judicial clemency. *Id* at 617, citing *Patrick*, 86 S.W.3d at 595. The court also cited to Court of Criminal Appeals cases that only discuss jurisdiction for motions for new trial and motions in arrest of judgment. *Shelton*, 396 S.W.3d at 618 (internal citations omitted).

Likewise, the Corpus Christi Court of Appeals has reasoned that "if the Legislature intended to provide the trial court with continuing jurisdiction to order judicial clemency at any time after discharging a defendant from community supervision, it would have expressly done so". *State v. Perez*, 494 S.W.3d 901, 905 (Tex. App.—Corpus Christi 2016, no pet.). The court concluded that, absent further guidance from the Court of Criminal Appeals or the Legislature, the trial court must order judicial clemency within 30 days after

discharge of community supervision. *Id.* In short, when faced with an open-ended jurisdiction for judicial clemency, the court felt quite entitled to impose its own deadline. As in the cases from other appellate courts discussed above, this imposed deadline was based on the deadlines for motions for new trial and motions in arrest of judgement. The purpose of those motions, as juxtaposed with the purpose for judicial clemency, is discussed later in this brief.

The State also cites to several unpublished opinions. Even though those cases have no precedential value, they will be quickly discussed here. In *Buie v. State*, the Texarkana Court of Appeals held that a defendant was not eligible for judicial clemency because DWIs are statutorily prohibited from judicial clemency. The court then notes that even if the defendant had been eligible, it was outside the 30 days. *Buie v. State*, No. 06-13-00024-CR, 2013 WL 5310532 at 2 (Tex. App.—Texarkana Sept. 18, 2013)(mem. op., not designated for publication).

The State also cites *Poornan v. State,* an unpublished opinion by the Dallas Court of Appeals, which relies on two other unpublished opinions for its authority. *Poornan v. State*, No. 05-18-00354-CR, 2018 WL 6566688 (Tex. App.—Dallas Dec. 13, 2008, no pet.)(mem. op., not designated for publication) at 2, citing *State v. Garfiled-Bentsen*, No. 13-17-00611-CR, 2018 WL 3151742 at

2 (Tex. App. Corpus Christi, June 28, 2018, pet. ref'd)(mem. op., not designated for publication) and *State v. Clarke*, Nos. 10-16-00354-CR, 10-16-00355-CR, 10-16-00356-CR, 2018 WL 1955086 at 2 (Tex. App.—Waco April 25, 2018, pet. ref'd.) (mem. op., not designated for publication). The State also cites as authority *Moore v. State*, in which the Beaumont Court of Appeals found the defendant was not eligible for judicial clemency because he was on community supervision for a sex offense, and is therefore statutorily barred from consideration for judicial clemency. *Moore v. State*, No. 09-06-00532-CR, 2008 WL 1904247 at 2 (Tex. App—Beaumont April 30, 2008, no pet.)(mem. op., not designated for publication).

Lastly, the State cites to *Ex parte Lewis*. 934 S.W.2d 801 (Tex. App.—Houston [1st Dist.] 1996, no pet). Although *Lewis* is out of this Court, it does not answer the question at issue in this case. Instead, the controversy in *Lewis* was a trial court extending a defendant's community supervision after the supervisory period expired. This Court held that the trial court's modification order extending community supervision was void because it was entered after the period of community supervision had expired. *Id.* at 802.

Although the State admits this Court has not squarely addressed this issue (Appellant's Brief p. 7, n. 3), Ms. Brent takes issue with the State's use of

*Raley v. State* as a parallel ruling. *Raley v. State*, 441 S.W.3d 647 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd). The issue in the trial court in *Raley* may have been a "similar issue" to this one (Appellant's Brief p. 7, n. 3), but the appellate court only ruled on whether the defendant had a right to appeal a denial of judicial clemency. *Raley*, 441 S.W.3d at 649. The Court found there was no statutory right to appeal a denial of judicial clemency by a defendant. *Id*. at 651.

The Court of Criminal Appeals has not ruled on the issue of whether a court has jurisdiction to grant judicial clemency outside its 30-day plenary power. The State sites to *State v. Guerrero*, stating that the court "cited favorably to *Shelton* for this point" (Appellant's Brief at 8). *State v. Guerrero*, 400 S.W.3d 576, 584 n. 28 (Tex. Crim. App. 2013), citing *Shelton*, 396 S.W.3d at 614. However, the State buries the lede. The *Guerrero* court did cite to *Shelton*, but only to say that the trial court could have dismissed the motion in that case as an "untimely motion in arrest of judgment," limiting the trial court's jurisdiction to rule on it based on Tex. R. App. Proc. 22.3. *Id.*

## B. Existing Statutory Jurisdictional Limitations

### 1. False Equivalency: Judicial Clemency, Motions for New Trial, and Motions in Arrest of Judgment

Each one of the cases cited by the State has placed a thirty-day limitation on judicial clemency jurisdiction based on deadlines explicitly given to motions for new trial and motions in arrest of judgment under the Rules of Appellate Procedure. Tex. R. App. Proc. 21.4; 22.3. It would behoove us then to consider the different purposes for these motions as compared with those for judicial clemency.

Motions in arrest of judgment are discussed in Tex. R. App.. Proc. 22.3. "*Motion in arrest of judgment* means a defendant's oral or written suggestion that, for reasons stated in the motion, the judgment rendered against the defendant was contrary to law." Tex. R. App. Proc. 22.3. The grounds for filing a motion in arrest of judgment include exceptions to the indictment or information on substantive grounds, a substantive defect in the indictment or information, or an invalid judgment. Tex. R. App. Proc. 22.2. These grounds for the motion are all identifiable immediately after the entering of the judgment, if not before.

Similarly, a motion for new trial can be filed within 30 days of the entrance of a sentence. Tex. R. App. Proc. 21.4. The grounds for filing a motion

for new trial, listed in Tex. R. App. Proc. 21.3, are all grounds that would be known or become known contemporaneously with the imposed sentence.

It makes sense that the Legislature would limit a trial court's jurisdiction to hear these two types of motions to very near the end of the trial and imposition of the sentence. The passage of time would benefit neither the party filing the motion nor the trial court in deciding upon the motion.

The opposite is true when considering judicial clemency. As the trial court in this case noted:

> The State is essentially proposing that [judicial clemency] is analogous to a motion for a new trial or a motion to arrest judgment. The Court disagrees with that. That is when someone has been duly convicted and then they are claiming that there was something wrong procedurally or something was done incorrectly. At which time they are fresh off of a trial and still in constant communication with their attorney and have the ability to prepare a motion for new trial or a motion to arrest judgment.
>
> I think that's vastly different from someone who was found guilty or pled guilty and sentenced to a period of probation that could be upwards of…years of probation. We do not admonish them like we do for a motion for new trial or motion to arrest judgment. They are not put on notice. Essentially after they finish their probation, they would not be usually in that type of communication with their attorney…which I think is an unreasonable request. Which is also why I think the legislature did not put a time period associated with this particular provision of the statute.

(3 R.R. at 5).

2. A More Accurate Parallel: Judicial Clemency and Petitions for Nondisclosure

Although motions for judicial clemency are not akin to motions for new trial or motions in arrest of judgment, guidance can be found in petitions for nondisclosure. Their purpose and effect are similar to that of judicial clemency.

*a. The effect and purpose of judicial clemency and nondisclosure*

Petitions for nondisclosure are civil in nature, but are heard in the trial court where the criminal prosecution occurred. Tex. Gov't Code § 411.0725(b). The effect of a petition for nondisclosure is to "legally [free one] from having to disclose certain information about your criminal history in response to questions on job applications…" and "prohibits entities holding information about a certain offense on [one's] criminal history record from disclosing that information." Office of Court Administration, Orders of Nondisclosure Overview (April 14, 2020), https://www.txcourts.gov/media/1445464/overview-of-orders-of-nondisclosure-2020.pdf. Similarly, the effect of judicial clemency is for the person to be "released from all penalties and disabilities resulting from the offense for which the defendant has been convicted…" Tex. Code Crim. Proc. art. 42A.701(f).

Judicial clemency is a "legislatively enacted mechanism which is appropriate 'when a trial judge believes that a person on community supervision is completely rehabilitated and is ready to re-take his place as a law-abiding member of society....'" *Shelton*, 396 S.W.3d at 620 (Pirtle, J., dissenting), citing *Cuellar,* 70 S.W.3d at 819. Judicial clemency is not a right; rather, it is a matter that lies within and is entrusted to the sound discretion of a trial court judge. *Id*., citing *Cuellar*, 70 S.W.3d at 818–19. In order to grant a petition for nondisclosure, along with meeting statutory requirements, the trial court must find that the issuance of an order of nondisclosure is in the "best interest of justice." Tex. Gov't Code § 411.0745(e). To grant a request for judicial clemency, the trial court must declare the defendant completely rehabilitated and ready retake her place in society (3 R.R. at 6; C.R. at 64). *Cuellar*, 70 S.W.3d at 819.

*b. Jurisdictional limitations in petitions for nondisclosure*

There are no statutory limitations on when a trial court's jurisdiction to grant a petition for nondisclosure expires. Tex. Gov't Code § 411. The limitation only limits *how soon* a person may file a petition. Tex. Gov't Code § 411.0725 (e). Specifically, Tex. Gov't Code § 411.0725(e)(1,2) lists situations in which a person must wait two or five years to file a petition for nondisclosure, and case law records defendants filing motions for nondisclosure nearly ten years after

the end of their probationary periods. *Harris v. State*, 402 S.W.3d 758, 759-60 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

The State pontificates that "it would be remarkable for the Legislature to silently extend a trial court's jurisdiction to an indefinite period of time" (Appellant's Brief at 8), yet that is what the legislature has done for petitions for nondisclosure, and the sky has yet to fall.

## C. Legislative Intent

### 1. Statutory Interpretation

The statute governing judicial clemency, Tex. Code Crim. Proc. art. 42A.701, became effective September 1, 2017. It was moved from Tex. Code Crim. Proc. art. 42.12 20(a) to this new section during the 2017 Texas Legislative Session. The Legislature could have used this opportunity to set a firm jurisdictional limit on judicial clemency, but it chose not to. It strains the limits of reason to rationalize the legislature's declination to give a thirty-day limit equates to the Legislature implicitly intending a thirty-day limit.

When interpreting statutes, the Court of Criminal Appeals seeks to "effectuate the 'collective' intent or purpose of the legislators who enacted the legislation." *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). When attempting to discern the collective legislative intent or purpose, the Court focuses on the literal text of the statute in question and attempts to discern the

fair, objective meaning of that text at the time of its enactment. *Id.* The literal text in Tex. Code Crim. App. art. 42A.701(f) does not limit the trial court's jurisdiction to hear motions for judicial clemency. Exception to this premise is taken when literal reading of the text would lead to absurd consequences the Legislature could not possibly have intended. *Id.* Trial courts already have unlimited jurisdiction to hear petitions for nondisclosure; extending that same understanding to judicial clemency makes sense.

The State notes that the Texas Constitution and the Legislature create and vest jurisdiction, while court-established rules, such as the Rules of Appellate Procedure, do not (Appellant's Brief at 6, citing *Olivo v. State*, 918 S.W.2d 519 (Tex. Crim. App. 1996)). Yet, this is inapposite of what the State is asking this Court to do, which is to use time limits articulated in the Appellate Rules for motions for new trial or motions in arrest of judgment, and cases interpreting those rules, and use them to create a new jurisdictional limit for judicial clemency. Moreover, the Texas Rules of Appellate Procedure are not statutes passed by the legislature; courts make those rules under their rule making authority. Those rules are not equal to statutes passed by the legislative branch.

As Justice Pirtle stated in his dissent in *Shelton*:

> The Legislature is vested with the constitutional authority to enact statutes and every presumption should be indulged in favor of a

> legislative enactment. The judicial branch of government is not justified in limiting the authority of the Legislature to enact a statute except where the Constitution has expressly imposed limits upon it. Here, the Legislature created a mechanism by which the judicial branch could use its reasoned judgment to determine if a defendant should continue to be burdened by the "penalties and disabilities" of a criminal conviction, under the limited circumstances specifically authorized by the Legislature. Those limitations do not include a restriction as to when a trial court may exercise that authority. If the Legislature had wanted to limit that authority to a specific time frame, it knows how to do it, and the judicial branch should not usurp that legislative function by creating a limitation where none exists.

*Shelton*, 396 S.W.3d at 621-22 (Pirtle, J., dissenting).

The State argues that "the Legislature knows how to extend a trial court's jurisdiction beyond final judgment" and "it if wanted to, it could" (Appellant's Brief p. 8). The other side of that coin is that the Legislature knows how to limit a trial court's jurisdiction and, when it has wanted to, it has.

2. Policy Considerations

The trial court listed two policy reasons for its interpretation that jurisdiction of the trial court to consider judicial clemency extended beyond the thirty-day limit found in some Texas Rules of Appellate Procedure. First, that limiting judicial clemency jurisdiction to the time of discharge of a defendant's community supervision, or the next thirty days, inhibits a judge's ability to determine whether the applicant is sufficiently rehabilitated (C.R. at 67).

Second, because defendants do not have representation during the time of discharge, they have no means to demonstrate their rehabilitation to the trial court or to even known that judicial clemency is available (C.R. at 67).

The State does not believe, "assuming these [considerations] have merit," that trial courts should take into account policy considerations (Appellant's Brief at 9). However, the State then goes on to state its own policy considerations – that requiring a trial court to make a decision about judicial clemency at the time of discharge is wise because "a trial court has been supervising a criminal defendant for an extended period of time" (Appellant's Brief at 9). Additionally, the State believes the trial court "has seen how compliant a criminal defendant has been with the terms and conditions of a supervision" (Appellant's Brief at 9).

Under this logic, a trial court's best information as to whether a defendant is rehabilitated is how well that defendant behaves when under direct supervision and threat of revocation. Instead, the trial court in our case believed, correctly, that the most reliable indicators of rehabilitation were how an applicant has lived when not under those constraints.

The State argues that "the time of discharge is the point at which a trial court has the greatest knowledge about a defendant's rehabilitation and can

make a more informed judgment" (Appellant's Brief at 10). In essence, the State is arguing that *less* information leads to a *more* informed judgment. Justice Pirtle, in his dissent in *Shelton*, states that "the creation of such a limitation is inconsistent with the public policy purpose of judicial clemency altogether." *Shelton*, 396 S.W.3d at 621 (Pirtle, J., dissenting).

## REPLY TO APPELLANT'S CLAIM OF ERROR TWO: THE ISSUE OF WHETHER APPELLEE'S DISCHARGE WAS ELIGIBLE FOR JUDICIAL CLEMENCY IS WAIVED

The State argues that Ms. Brent's discharge from community supervision is not the type of discharge eligible for judicial clemency. This is a new argument, not raised in the trial court, and therefore is not preserved for appeal. Tex. R. App. Proc. 33.1; *Gillenwaters v. State*, 205 S.W.3d 534, 537 (Tex. Crim. App. 2006).

In the event that the Court believes this argument is not waived, this claim will be addressed. First, we look at the Order Affecting Community Supervision (C.R. at 53). The boxes marked on the form show that the judge was "terminating community supervision period of the defendant," and, "after considering the evidence the Judge presiding finds that: The period having expired, defendant is discharged by operation of law" (C.R. at 53).

The State argues that under its reading of Code of Crim. Proc. art. 42A.701, any defendant who has her community supervision terminated after the term expires is ineligible for judicial clemency (Appellant's Brief at 10). The State argues that Art. 42A.701 does not govern discharges due to the natural expiration of supervision (Appellant's Brief at 10). By way of example, the State points out that intoxication offense and sex offenses are not governed by Art. 42A.701 (Appellant's Brief at 11, n.5). That is true, as both of those categories have entire subchapters addressing their supervision requirements. Tex. Code Crim. Proc. 42A, Subch. I, J. Moreover, nothing in the Rules require the trial court to enter an order granting judicial clemency only at the time the period of community supervision ends. It might be best practice for courts to order a defendant discharged at the time the term of community supervision expires, but nothing prevents courts from doing it later.

Only Subchapter O of Article 42A addresses "Reduction or Termination of Community Supervision Period." Tex. Code. Crim. Proc., Subch. O. Subchapter O contains two statutes – 42A.701, which we address today, and 42A.702, which addresses time credits for felony probationers. Tex. Code Crim. Proc. art. 42A.701, 42A.702. The only other subchapter of Art. 42A to address how community supervision ends is Subchapter P, which covers "Revocation and Other Sanctions." Tex. Code Crim. Proc., Subch. P. If we read Art. 42A as the the

State suggests, there is no section that covers the discharge of any Defendant who satisfactorily finished her term and whose term was allowed to expire.

There is no evidence in the record that Ms. Brent did not complete her community supervision requirements. In fact, the opposite is true. Had Ms. Brent not completed her community supervision requirements, there would be record of her revocation, sanctions, or extension of the probationary term. None of these things occurred. What the State is asking this Court to do is to reclassify a discharge from community service at the end of the term into an unsatisfactory discharge.

Tex. Code Crim. Proc. 42A.701(f-1) orders the Office of Court Administration to adopt a standardized form for use in discharging a defendant "under this article." That form must allow the judge to "(1) discharge the defendant; or (2) [grant judicial clemency]." Tex. Code Crim. Proc. art. 42A.701(f-1). That form, promulgated by the Office of Court Administration, entitled "Order Affecting Community Supervision", was used in this case (C.R. at 53). The Order allows the judge to discharge the defendant or terminate community supervision. In this case, the judge terminated Ms. Brent's community supervision, as indicated by the election of that option at the top of the form. The judge then had the choice of reasons for terminating or discharging the defendant.

In *Cuellar*, the Court of Criminal Appeals described two types of discharge from community supervision under then article 42.12 art. 20, the "usual method" and judicial clemency. Speaking of the first type of discharge:

> First, there is the usual method of discharge. When a person placed on community supervision has completed his entire term of community supervision and has satisfactorily fulfilled all of the conditions of community supervision, the trial judge *shall* discharge the defendant from community supervision. In addition, although he need not do so, the judge *may* discharge the person early if the "defendant has satisfactorily completed one-third of the original community supervision period or two years of community supervision, whichever is less...." Tex.Code Crim. Proc. art. 42.12, art. 20(a). But a person who has fulfilled all of the conditions of community supervision must be discharged. That person has paid his debt to society and, in effect, "graduates" from community supervision…The vast majority of felony probation sentences are completed in this manner.

*Cuellar*, 70 S.W.3d at 818.

As described in the quotation, Ms. Brent completed her term of community supervision and fulfilled her requirements. To argue that Ms. Brent was not satisfactorily discharged flies in the face of the record, statute, and case law.

## PRAYER

Ms. Brent prays this Court find that the trial court did not err in granting her judicial clemency, and leave its ruling undisturbed. Additionally, Ms. Brent

prays this court find that the State did not preserve its second point of error. In the alternative, Ms. Brent prays this Court find that she was eligible for judicial clemency under Tex. Code Crim. Proc. art. 42A.701.

Respectfully submitted,

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*/s/ Miranda Meador*

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## Certificate of Service

A true and correct copy of the foregoing brief was e-filed with the First Court of Appeals, was served electronically upon the Appellate Division of the Harris County District Attorney's Office, and was also sent on the same date by first-class mail to:

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*/s/ Miranda Meador*
Miranda Meador

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(3), undersigned counsel certifies that this brief complies with the type-volume limitations of Tex. R. App. Proc. 9.4(e)(i).

1. Exclusive of the portions exempted by Tex. R. App. Proc. 9.4 (i)(1), this brief contains 4, 971 words printed in a proportionally spaced typeface.
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/s/ *Miranda Meador*
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